UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

ADOLFO V. SAENZ, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. C03-4041-MWB **REPORT AND RECOMMENDATION**

TABLE OF CONTENTS

I. INTRODUCTION 2

II. PROCEDURAL AND FACTUAL BACKGROUND 2

A. Procedural Background 2
B. Factual Background 3
1. Introductory facts and Saenz's daily activities 3
2. Saenz's medical history 7
3. Vocational expert's testimony 15
4. The ALJ's decision 16

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD 18

A. Disability Determinations and the Burden of Proof 18
B. The Substantial Evidence Standard 20

IV. ANALYSIS 23

V. CONCLUSION 28

I. INTRODUCTION

The plaintiff Adolfo Saenz ("Saenz") appeals a decision by an administrative law judge ("ALJ") denying his application for Title XVI supplemental security income ("SSI") and Title II disability insurance ("DI") benefits. Saenz argues the Record does not contain substantial evidence to support the ALJ's decision. (*See* Doc. No. 8)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On September 18, 2000, Saenz protectively filed an application for DI benefits (R. 90-92) and an application for SSI benefits (R. 330-33), alleging a disability onset date of October 4, 1991. Saenz alleged he was disabled due to back pain, chronic high blood pressure, glaucoma, and arthritis in his right knee. (R. 111) The applications were denied initially on January 30, 2001 (R. 63, 65-68, 334), and on reconsideration on June 28, 2001 (R. 64, 70-74, 335). On July 11, 2001, Saenz requested a hearing (R. 75), and a hearing was held before ALJ Ronald D. Lahners on July 12, 2002, in South Sioux City, Nebraska. (R. 23-62[1]) Saenz was represented at the hearing by non-attorney Lee Sturgeon. Saenz testified at the hearing, as did Vocational Expert ("VE") Sandra Trudeau. At the hearing, Saenz amended his alleged disability onset date to August 24, 2000. (R. 27; *see* R. 13)

On January 28, 2003, the ALJ ruled Saenz was not entitled to benefits. (R. 10-21) On April 18, 2003, the Appeals Council of the Social Security Administration denied Saenz's request for review (R. 6-9), making the ALJ's decision the final decision of the Commissioner.

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[1] In her brief, the Commissioner erroneously cites the hearing transcript as appearing at pages 25-40 of the Record, rather than pages 25-62. (Doc. No. 9, p. 1)

Saenz filed a timely Complaint in this court on May 15, 2003, seeking judicial review of the ALJ's ruling. (Doc. No. 3) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Saenz's claim. Saenz filed a brief supporting his claim on September 26, 2003. (Doc. No. 8) The Commissioner filed a responsive brief on November 12, 2003. (Doc. No. 9). The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Saenz's claim for benefits.

B. Factual Background

1. Introductory facts and Saenz's daily activities

At the time of the hearing, Saenz was 59 years old, and living in an apartment in Sioux City, Iowa. He was 5'10" tall and weighed about 270 pounds. (R. 28)

From March 1976 to October 1991, Saenz worked as a warehouse foreman at a furniture store, where he supervised seven to eight other employees. He received incoming merchandise, monitored warehouse inventory, carried out furniture for customers, and stocked merchandise. The job required him to lift all types of furniture, and he lifted fifty pounds frequently and 100 pounds or more occasionally. (R. 29, 128-29) He suffered an on-the-job injury to his back in October 1991, that ultimately led to surgery in 1993. He testified he continued to work (although not at the same job) despite the fact that he was in pain most of the time from the injury.

He worked as a door greeter at a department store from July to December of 1994. In addition to greeting customers at the door, he also washed windows, helped bring in shopping carts from outside, helped with a display area near the door, and provided some security. The job required him to lift ten pounds frequently, when he would move display

items five to six feet, and he lifted up to twenty pounds occasionally. (R. 30, 128, 130) He was on his feet most of the time in the job. (R. 30)

He worked for the South Sioux City Schools from December 1994 to February 1996, as a "paraprofessional." The record does not indicate what his duties were in the job. He left the job when his mother-in-law became ill. (R. 122)

Saenz obtained a G.E.D. in 1996, and subsequently took about 39 hours of college courses in child development. He stated he reads and writes English with no problem, and handles his own finances. (R. 28-29, 48)

He worked from May 1999 to August 2000, as a day care worker and teacher's aide at Dos Mundos Day Care. He was on his feet most of the time in the job. He stated the job was "kind of hectic," and he dealt with children up to twelve or thirteen years old. He lifted from ten to thirty pounds on the job, for example in moving desks to another room, or in lifting toddlers. He sometimes had to drive a van and pick up children, and he stated the driving would "really intensify [his] pain." (R. 30-31, 121) He stated "it was a great sacrifice" to be on his feet most of the day. (R. 38, 121)

From August 18-24, 2000, Saenz worked at Midstep Services. On August 24, 2000, he was lifting a patient by himself and felt "a sharp stab" in his back. He stated he has not worked at all since that time, and he has been in pain ever since the injury. (R 121) Before the injury, he had been able to work on his feet in spite of the pain from his 1991 accident, but he stated that since the injury at Midstep, he has trouble even getting out of bed some days, and feels like he is "crooked." (R. 38)

Saenz testified he has problems with his right knee. A physician's assistant, David Faldmo,[2] reviewed X-rays and, according to Saenz, told him "there's a loose part in there in my knee that's causing the pain." (R. 31) Saenz stated P.A. Faldmo opined he eventually would have to have surgery on his knee. P.A. Faldmo gave Saenz steroid injections, which lasted for a couple of weeks and then the pain came back. (R. 31-32)

Saenz also testified he has pain in his back, and he wakes up some days and feels like he is walking "real crooked." (R. 32) On those days, he is unable to do anything, including small chores like sweeping his house. (*Id.*) The pain from his back radiates into his left leg. (R. 37) Disk surgery in January 1993 (*see* R. 192-99) and steroid injections have failed to alleviate his back pain. (R. 37)

In addition, he stated he had seen an eye doctor recently, who told him he needed surgery immediately. Saenz stated he has significant vision loss due to glaucoma, causing him to bump into people and experience poor peripheral vision. He has been unable to afford the surgery, so the doctor put him on eye drops.[3] (R. 32-33)

Other problems that bother Saenz include fluctuating blood pressure, headaches, and eye pain. (R. 53) However, prior to his back injury in 2000, Saenz felt he could do the work at Midstep Services in spite of his other problems. (R. 54, 55) Dr. Schryver, the doctor chosen by Midstep Services, eventually released Saenz to return to light-duty work,

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[2]Saenz erroneously referred to P.A. Faldmo as a doctor, and the transcript refers to him as "Dr. Dave Thalmo." (R. 31)

[3]Records from Dr. Stanifer, the eye doctor, are not included anywhere in the record. Although Saenz's representative stated he would obtain the records, they were not submitted subsequent to the hearing, to either the ALJ or the Appeals Council. P.A. Faldmo notes Saenz was referred to Dr. Stanifer for evaluation of glaucoma on February 12, 2002 (R. 295), and on March 12, 2002, he notes Saenz saw Dr. Stanifer, surgery was recommended, but Saenz wanted to hold off due to financial problems. (R. 329)

but Midstep told Saenz they did not have any light-duty work available for him to do. He decided not to pursue the matter further. (R. 56)

Saenz stated he receives most of his care from P.A. Faldmo at the Siouxland Community Health Center. He has never seen a physician at the clinic. He stated he takes two medications for high blood pressure, and Amitriptyline to help him sleep. For pain, he takes Lortab every four hours as needed, and one or two Celebrex pills per day. (R. 33-35) He stated the Lortab makes him drowsy. (R. 49) It dulls his pain but does not remove it completely. (R. 49-50) When he takes Amitriptyline at night or in the morning, he will feel drowsy all day. Even taking the pills, he still wakes up two or three times each night. (R. 50-51)

Saenz opined he probably would be unable to do a job sitting down, "Unless, someone guarantees me that I could do it." (R. 39) If he sits too long, he has pain in his lower back, radiating down his leg. During the hearing, he shifted around quite a bit and had to stand on occasion. If he is free to shift positions in his chair, he felt he could sit for fifteen or twenty minutes at a time. (R. 39-40) However, he also felt he probably would be unable to perform a job even if he were allowed to shift positions and to stand when necessary, "because at home I try to do housework and I don't do it." (R. 40) He opined he could work at a job allowing him this type of flexibility for an hour-and-a-half to two hours, and then he would have to lie down. (R. 41) He cannot bend over to pick something up off the floor without experiencing back pain, and he also has pain if he tries to clean something standing up, like his bathroom sink. (R. 49)

He also opined his medications would affect his ability to do a job. He compared the effects of his pain pills to having three beers, and speculated the medications would affect his ability to remember what he had to do to perform a job. (R. 52)

He stated the longest period of time he does anything on his feet is fifteen to twenty minutes, and when he is not standing, he will lie down or rest on the bed. He spends most of his day on the bed either sleeping, watching television, listening to the radio, or reading. (R. 41-42, 46, 52) He leaves his house two or three times a week to go to the grocery store or doctor's office. He does not go out to visit friends or relatives, but he has friends or relatives who come over and visit him. (R. 42) His goddaughters. ages 15 and 17, help him clean his house and do laundry. (R. 46) He uses disposable dishware so he does not have to wash dishes. *Id.*

He attempts to exercise, stating when he is sitting down he will "try to bend a little bit," very slowly, being careful not to hurt himself. He stated that in the past, he tried to do strenuous exercise and he had pain the next day. (R. 43) He stated that once, in 1999, he spent two or three days in bed after trying to exercise. He noted P.A. Faldmo has suggested he continue trying to stretch his back, but has not given him any specific exercises to do for his back. Dr. Leonel Herrera saw Saenz in November 2000, and recommended that he exercise, work, and walk to assist in reducing his pain. Saenz stated there was a lot of snow on the ground at that time so he did not walk much. (R. 56)

Saenz stated he will walk about five minutes, but then his pain worsens, particularly in his knee. Other people help him shop for groceries. He can walk around the store briefly, but he usually stays in the car and gives the driver a list of things he needs. (R. 43-44)

Saenz does not drive. He will take the bus, or have a friend drive him wherever he needs to go. He sometimes is unable to stay seated for an entire bus ride due to pain, and he has to stand up for awhile. (R. 45)

2. Saenz's medical history

Saenz underwent a lumbar myelogram in October 1991, that indicated a probable large herniated disc. (R. 183) Conservative treatment failed to alleviate his pain, and he underwent a laminectomy and nerve root decompression in January 1993. (R. 192-99) The procedure resolved the pain in his left leg, but he continued to have back pain. He was referred to physical therapy, where it was recommended he undergo a work hardening program. (R. 262, 224-26) In March 1993, the physical therapist noted Saenz worked diligently and performed his exercises with very few complaints. He evidenced progress after twelve therapy sessions. (R. 222-23) He attended a work hardening program for four hours a day for several weeks beginning April 8, 1993. He reported continued discomfort in his back and left hip, but he remained compliant with his exercise regimen. By May 20, 1993, the physical therapist reported Saenz's lifting ability had increased, but his left leg was slightly weaker. He was given a 22% impairment rating of the whole body, and was classified at a medium work level except for knuckle-to-shoulder lifting, which was limited to forty pounds. The physical therapist opined Saenz could perform a medium level job. (R. 207-16, 260) He was given a release for light-duty work based on a functional capacity assessment performed by the physical therapist. (R. 258-59)

Saenz continued to report problems with back pain and intermittent left leg pain. Doctors prescribed Lorcet Plus and Ibuprofen. By April 1995, a doctor noted Saenz's condition was improving and he was working thirty to forty hours per week. His medication was switched to Feldene. (R. 237) In July 1995, he was back at the doctor complaining of daily back pain, radiating down the back of his left leg to the knee level. He was advised to lose weight and continue conservative therapies. It was suggested he undergo a course of back rehabilitation. (R. 272-76) He next saw a doctor in April 1996, still complaining of back pain. John P. Masciale, M.D. advised Saenz to lose weight. In August 1996, he returned to see Dr. Masciale, complaining of back pain, a stabbing pain

in the backs of his thigh and calf, and numbness in his foot. Dr. Masciale prescribed a Medrol Dosepak, which alleviated Saenz's leg pain. He was placed on Relafen and Lorcet Plus. (R. 248-50)

Dr. Masciale wrote a letter on May 13, 1997, to the Work Force Development Corporation, indicating there was no reason Saenz could not perform the duties of a child care worker. The doctor noted Saenz had been cleared medically and orthopedically for full duty. (R. 245) Saenz saw Dr. Masciale in December 1997, complaining of some back pain with burning discomfort, and aching behind his left thigh. The doctor prescribed Oruvail and refilled Saenz's prescription for Lorcet Plus. The doctor noted Saenz was "vocationally retraining with college education classes," and Dr. Masciale was pleased with his progress. (R. 243)

Saenz did not see Dr. Masciale again until June 2000. Saenz reported he had been doing well, but a couple of days earlier, he had "simply leaned forward while in the seated position and his back began to hurt increasingly severe, such that there [was] quite a bit of sharp pain in the left side of his back, which [was] becoming increasingly intolerable." (R. 242) Dr. Masciale found some muscle tenderness, "a diffuse area of decreased sensation involving all of the toes of both feet," absent Achilles reflexes, and "an absent left patellar reflex." (*Id.*) The doctor suggested Saenz might have sustained a recurrence of a disk herniation. He prescribed a Medrol Dosepak, Hydrocodone, and Celebrex, and directed Saenz to follow up in seven to ten days. (*Id.*)

Saenz apparently moved from Corpus Christi, Texas, to Iowa during the next few weeks. On August 29, 2000, Dr. Masciale wrote a referral letter to Dr. W.O. Samuelson in Sioux City, Iowa. (R. 240) The record only contains evidence of one appointment with Dr. Samuelson, which was in April 1995. Nothing in the record indicates Saenz saw Dr. Samuelson after he moved to Iowa in 2000.

Saenz was examined by Thomas E. Schryver, M.D., after he injured his back at Midstep Services. Dr. Schryver diagnosed him with left sciatica and LS strain. He prescribed Vioxx, and ordered Saenz not to work. (R. 265-66) At a follow-up visit on September 5, 2000, Saenz reported having less pain that at the prior exam. He had restricted range of motion. He was released to light duty, with a lifting restriction of twenty-five pounds. (R. 264-65)

On November 27, 2000, Saenz saw Leonel H. Herrera, M.D., on referral from Dr. Masciale. Saenz complained of sharp back pain, left leg pain, and some numbness in his left leg. He was taking Hydrocodone and Celebrex for pain, and Ziac for blood pressure. Saenz gave a history of work-related injury in 1991, and surgery in 1993, which he stated helped for awhile. He stated he underwent training and then worked as an early child development instructor. He was in Iowa from 1994-95, and indicated he saw Dr. Samuelson during that time. He stated "he tried to work as a door greater [sic] at Wal-Mart and could not tolerate the standing." (R. 269) He quit the job, and moved to Iowa in August 2000. He reported working for about one week, but he "could not tolerate the prolonged standing." (*Id.*)

Saenz reported the following symptoms:

> Patient indicates back pain is graded a 5 out [of] 10, moderate and tolerable requiring restrictions on daily activities. Leg pain is a 3 out of 10, mild and having no effect on ordinary activities. Pain occurs on a daily basis and is worse in the a.m. Frequency of pain is constant. Pain is worse with activity. Patient reports he will have numbness in the left leg and he sometimes feels weakness in the left leg and it will cause [him] to lose his balance. Patient denies any tingling in his leg or feet. He reports he is limited to walking three blocks due to pain. Patient reports he will feel pain in the tip of [his] tailbone and since the onset of his pain[,] he has had spells of very little pain.

> Patient reports the whole leg becomes painful, goes numb or gives away [sic]. . . . Patient reports pain will awaken him from sleep at night and also keep him from getting to sleep. Change in position seems to help. Walking, sit[t]ing, driving, nights, bending, lifting, arising from a chair and housework all worsen his pain syndrome. Standing and lying down seem[] to reduce his pain and no effect noted with coughing or sneezing. No help noted with muscle relaxants or Aspirin. Some relief noted with bedrest, physical therapy, hospitalization, cortisone injection, surgery, ice, braces[,] pain medications[,] and exercise.

(R. 269-70) Saenz also reported gaining twenty pounds over the prior two years due to his inactivity. He reported feeling "down and depressed." (R. 270)

Dr. Herrera noted a recent MRI indicated "no abnormality in regards to herniated disc," although it did "identify degenerative joint disease and degenerative disc disease." (*Id.*) Upon examination, Dr. Herrera found Saenz could walk on his heels and toes, stand erectly without a list, and he had a normal tandem gait. He had some limited range of motion on forward flexion, and tenderness over his left sacroiliac and left sciatic notch. He evidenced a "positive pain response to trunk twisting, [and] neck compression." (R. 271) The doctor's impression and recommendations were as follows:

> Impression:
>
> 1. Chronic bilateral sacroiliac ligamentous sprain and chronic deconditioning syndrome.
> 2. Status post lumbar surgery with no residual disc herniation.
> 3. Status post L4-5 HNP and diskectomy in 1993.
>
> Recommendations:
>
> 1. I would recommend that the patient be instructed in a lifeline home exercise program using the lifeline gym.
> 2. I would recommend that this patient initiate/start working on a regular basis. I do not believe he is totally disabled. Patient has been given work restrictions in the past. These work

restrictions remain in effect and I do believe he is capable of a full time duty within these restrictions.

3. Patient is encouraged to exercise not only with the lifeline but also on a walking program 5-6 days per week to assist with pain.
4. I advised the patient to use over the counter Ibuprofen if the Celebrex is not giving him significant relief.
5. Patient may continue the Celebrex, as it seems to be reducing the pain.
6. I advised the patient to come off the hydrocodone. Patient with a chronic pain condition and there is no acute flare that required narcotic analgesics. The patient is at risk [for] complications including nerve injury, blood vessel injury, infection, and other complications for developing a tolerance as well as painful rebound.
7. I would be happy to see this patient again if his symptoms do not resolve. I do not believe he is in any need [of] any surgery and I believe exercise, work and walking will greatly assist in reducing this patient's pain.

(R. 271)

Dennis A. Weis, M.D. performed a physical residual functional capacity assessment of Saenz on January 20, 2001. He found Saenz could lift/carry ten pounds frequently and twenty pounds occasionally; stand, walk, and/or sit, with normal breaks, for a total of six hours in an eight-hour workday; push or pull without limitation; occasionally climb ramps, stairs, ladders, ropes, or scaffolds; and occasionally balance, stoop, kneel, crouch, and crawl. He found Saenz to have no manipulative, visual, communicative, or environmental limitations. (R. 277-84) Dr. Weis found the record evidence supports Saenz's complaints of back pain, but he found some inconsistencies between Saenz's actual activities of daily living and his documented limitations. (R. 285)

On January 31, 2001, Saenz began receiving treatment at the Siouxland Community Health Center. He was seen by David Faldmo, PA-C, for a condition unrelated to his

application for benefits. He underwent a physical examination on February 13, 2001, including an X-ray of his right knee. The X-ray indicated mild degenerative changes of the right knee joint, a small osteocartilaginous loose body in the joint, and no joint effusion. (R. 311-12) P.A. Faldmo saw Saenz on February 27, 2001, for follow-up regarding his hypertension. At the visit, Saenz complained of continued pain in his right knee and low back. His pain medications were not changed. (R. 308)

P.A. Faldmo saw Saenz again a month later, and Saenz still complained of chronic back pain. He stated he had not been taking his Celebrex because it was not helping. P.A. Faldmo switched him to Naprosyn, and recommended he take Tylenol as needed. (R. 306, 308) On April 23, 2001, P.A. Faldmo indicated, in a letter to a disability examiner, that Saenz had not been evaluated completely for his knee problems, and therefore a determination could not be made as to his work-related capacities. (R. 307) At Saenz's next follow-up appointment on April 25, 2001, he reported the Naprosyn had not worked any better than the Celebrex. His blood pressure was under good control on his current medications. His right knee pain was stable. (R. 305-06)

Douglas W. Martin, M.D. performed a comprehensive disability examination of Saenz on May 22, 2001. (R. 287-93) Saenz exhibited slight limitation of range of motion of his right knee (5°-120° out of 0°-180°); slight limitation on forward flexion of both hips (10° less than normal); and moderate restriction of flexion-extension of his lumbar region (0°-60° out of 0°-90°). (R. 292-93) Dr. Martin assessed Saenz as having residual musculoskeletal low back pain, with no objective evidence of residual or neurologic deficits; hypertension that had been "somewhat difficult to control"; glaucoma; and degenerative joint disease of the right knee. (R. 289) He reached the following conclusions regarding Saenz's functional capacities:

> With respect to this gentleman's remaining functional capacities, he is going to have some residual problems from the back and also currently has problems with the right knee. Whether or not the right knee problems can be improved into the future is unknown to this examiner. I do think he has some degenerative problems there that are going to be limiting on a permanent basis despite what could be done surgically and with other types of medical management.
>
> Given all of his problems with respect to his remaining functional capacities, lifting and carrying should be limited to 20 pounds on an occasional basis, 10 pounds on a frequent basis and negligible on a constant basis. With respect to standing, he probably would be able to make it about 4-6 hours out of an 8 hour day. With respect to walking, he would probably make it about 1 - 1 1/2 blocks before having to take a break. I would have no concerns with sitting. Stooping, climbing, kneeling and crawling activities would probably best be left only on a rare occasion. With respect to handling objects, seeing, hearing, speaking, traveling or with issues concerning exposures to the work environment, such as to dust, fumes, temperatures or hazards, I would not have any particular problems or concerns there.

(*Id.*)

Saenz saw P.A. Faldmo again on June 6, 2001, with complaints of right knee pain. He received a steroid injection in his knee. (R. 304-05) When he returned for follow-up on June 22, 2001, he reported the injection had been effective for about two weeks, but then his knee began hurting again. He was given a prescription for Amitriptyline. (R. 303, 305) He saw P.A. Faldmo on October 26, 2001, with complaints of lower back pain radiating into his left leg, and left-sided abdominal pain. P.A. Faldmo prescribed Prednisone. (R. 298-300) Saenz returned for follow-up on November 5, 2001, and reported he had only been able to tolerate the Prednisone for two days "because it just made him feel too wired, he didn't sleep at all for two days and then he crashed on the

third." (R. 297) He reported his back pain was better, still present but not excessive, and his abdominal pain had resolved. He was still having pain in his knee. P.A. Faldmo directed him to continue taking his current medications. (*Id.*)

Saenz returned for follow-up on February 12, 2002. He had stopped taking one of his blood pressure medications because he no longer could get the drug at a reduced price. He complained of reduced peripheral vision, and reported he had stopped seeing an ophthalmologist in 1998 due to lack of funds. P.A. Faldmo switched him to Norvasc, which he could get through a community care program. He referred Saenz to Dr. Stanifer for evaluation of his glaucoma. (R. 296)

At his next follow-up with P.A. Faldmo on March 12, 2002, Saenz reported he had seen Dr. Stanifer, who had recommended surgery for his glaucoma. Saenz declined for financial reasons, and Dr. Stanifer gave him some drops to use. P.A. Faldmo recommended Saenz follow up with Dr. Stanifer after being on the drops for one month. He noted Saenz's low back pain was stable, and his hypertension was under "fair control." (R. 329)

On March 12, 2002, P.A. Faldmo completed a Medical Source Statement about Saenz's work abilities. (R. 348-52) He found Saenz could sit for a total of four hours in an eight-hour workday, but he could only sit for fifteen minutes continuously before needing to stand or walk about for a few minutes. He could stand or walk about for a total of two hours in a day, but only for fifteen minutes continuously before needing to sit for a few minutes. In addition to regular morning and afternoon breaks and a lunch period, all scheduled at two-hour intervals, Saenz would need two hours of additional rest periods in order to relieve his pain, and he would need to lie down or recline during those additional rest periods. He found Saenz could lift up to ten pounds occasionally, and he should never lift more than ten pounds. He could balance occasionally, and he should

stoop or bend forward rarely or not at all. He could perform reaching, handling, and fingering tasks occasionally. He had no mental limitations. P.A. Faldmo based his assessment on diagnoses of chronic low back pain, and knee pain caused by osteoarthritis. (*Id.*)

3. Vocational expert's testimony

VE Sandra Trudeau considered the following hypothetical posed by the ALJ:

> Let's assume that we have someone such as Mr. Saenz of the same age, education, and past work history both as to exertional as well as skill level, some transferable skills. Take all those things into consideration. And then this further limitation that such an individual could lift up to 20 pounds on occasion, 10 pounds on a regular basis. Could stand for four to six hours in a normal workday, walk one and a half blocks at a time, and have no particular problem sitting. Could occasionally bend, but stoop, kneel, crawl, if done at all, should only be done rarely. With such limitations, would there be any of the claimant's past relevant work that such person could perform?

(R. 58) The VE responded that the hypothetical individual could return to his past work as a door greeter.[4] (*Id.*) However, if Saenz's testimony were taken as credible, the VE indicated there would not be any type of work he could perform due to the level of pain he experiences, and the fact that because of the pain, he spends most of the day in bed. (R. 59)

He also would be unable to work if he could only stand for two hours during an eight-hour workday, or if his regular medications made him drowsy or put him to sleep, or if his exertional limitations were no frequent lifting, occasional lifting up to ten pounds,

[4] At this point, the VE made additional statements, but the transcript notes the tape was inaudible.

sitting for a total of four hours in an eight-hour day, standing for a total of two hours in an eight-hour day. (R. 59-60)

4. The ALJ's decision

The ALJ found Saenz had not performed substantial gainful activity since his alleged onset date of August 24, 2000. He found Saenz has severe impairments consisting of "status post L4-5 microdiskectomy, hypertension, glaucoma, and degenerative joint disease of the right knee," none of which met the Listing requirements. (R. 20) He assessed Saenz's RFC as follows:

> [W]hile [his] impairments have imposed limitations upon his ability to perform basic work-related functions (he cannot except on rare occasions stoop, kneel, and crawl), the Claimant can lift/carry 20 pounds occasionally and 10 pounds frequently, can stand for 4-6 hours during a normal eight hour workday, can walk for 1 1/2 blocks, has no difficulty sitting, and can occasionally bend.

(*Id.*) Accordingly, the ALJ found Saenz could return to his past relevant work as a teacher aide II and day care worker, both of which jobs are "light in exertion and semi-skilled in nature." (*Id.*; R. 14)

The ALJ found Saenz's subjective complaints were not credible. He noted Dr. Masciale reported, on August 29, 2000, that to his knowledge, Saenz "was employed and had moved to Iowa." The ALJ found, "This is not the type of report one would expect from a treating physician of an individual who totally lacks the ability to engage in substantial gainful work activity." (R. 18) Although Saenz complained of radiating pain down his leg, the ALJ noted that when Dr. Herrera examined Saenz on November 27, 2000, Saenz "experienced no problems with straight leg raising in both the sitting and supine position[s]." (*Id.*) His straight-leg-raising test also was negative during a May 22,

2001, consultative examination. The ALJ noted, "Again these are not the objective findings one would expect to have reported concerning an individual whose back pain prevents work." (*Id.*) The ALJ further pointed to an X-ray report of August 29, 2000, which showed minimal degenerative changes in Saenz's lumbar spine. The ALJ observed, "Minimal degenerative changes could possibly impose some limitations of functioning but not to the extent alleged by [Saenz]." (*Id.*)

The ALJ further noted Saenz "does little in the way of exercise in an effort to improve the functional ability of his back," despite Dr. Herrera's recommendation that Saenz exercise regularly, engage in a walking program, and begin working regularly. (R. 18-19) The ALJ gave little weight to P.A. Faldmo's opinion regarding Saenz's limitations because P.A. Faldmo "is not considered an acceptable medical source." (R. 19) The ALJ found no evidence to indicate Saenz has disabling vision difficulties due to his glaucoma. (*Id.*)

For these reasons, the ALJ found Saenz's testimony was not credible to the extent that he testified he is unable to perform virtually any type of work activity on a sustained basis. The ALJ noted Saenz's "past relevant work as a teacher aide II and day care worker did not require exertional or non-exertional abilities beyond those set forth in the residual functional capacity assessment [found by the ALJ], both as [Saenz] performed the jobs and as they are described in the Dictionary of Occupational Titles." (*Id.*) Therefore, the ALJ found Saenz possessed the RFC to perform his past relevant work, and as a result, he was not disabled. (*Id.*)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations and the Burden of Proof

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003); *Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner will consider a claimant's work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see "whether the claimant has a severe impairment that significantly limits the claimant's physical or mental ability to perform basic work activities." *Dixon*, 353 F.3d at 605; *accord Lewis v. Barnhart*, 353 F.3d 642, 645 (8th Cir. 2003). The United States Supreme Court has explained:

> The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." . . . Such

> abilities and aptitudes include "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling"; "[c]apacities for seeing, hearing, and speaking"; "[u]nderstanding, carrying out and remembering simple instructions"; "[u]se of judgment"; "[r]esponding appropriately to supervision, co-workers, and usual work situations"; and "[d]ealing with changes in a routine work setting."

Bowen v. Yuckert, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987) (citing 20 C.F.R. §§ 404.1521(b), 416.921(b)).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, or work experience. 20 C.F.R. § 404.1520; *Kelley*, 133 F.3d at 588.

Fourth, if the claimant's impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant's residual functional capacity ("RFC") to determine the claimant's "ability to meet the physical, mental, sensory, and other requirements" of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(4)(iv); 404.1545(4); *see Lewis*, 353 F.3d at 645-46 ("RFC is a medical question defined wholly in terms of the claimant's physical ability to perform exertional tasks or, in other words, 'what the claimant can still do' despite his or her physical or mental limitations.") (citing *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987); 20 C.F.R. § 404.1520(e) (1986)); *Dixon*, *supra*. The claimant is responsible for providing evidence the Commissioner will use to make a finding as to the claimant's RFC, but the Commissioner is responsible for developing the claimant's "complete medical history, including arranging for a consultative examination(s) if necessary, and making

every reasonable effort to help [the claimant] get medical reports from [the claimant's] own medical sources." 20 C.F.R. § 404.1545(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. *See id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(iv).

Fifth, if the claimant's RFC as determined in step four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner "to prove that there is other work that [the claimant] can do, given [the claimant's] RFC [as determined at step four], age, education, and work experience." Clarification of Rules Involving Residual Functional Capacity Assessments, etc., 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003). The Commissioner must prove not only that the claimant's RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Id.*; 20 C.F.R. § 404.1520(4)(v); *Dixon, supra*; *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) ("[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.") (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)); *Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find the claimant is disabled. 20 C.F.R. § 404.1520(r)(v).

B. The Substantial Evidence Standard

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the record as a whole. *Krogmeier*

v. Barnhart, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Weiler, supra,* 179 F.3d at 1109 (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley, supra,* 133 F.3d at 587 (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler, id.*; *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier,* 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell*, 242 F.3d at 796*; Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)). The court must "search the record for evidence contradicting the [Commissioner's] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial." *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (also citing *Cline*, *supra*).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91,

99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does not "reweigh the evidence presented to the ALJ," *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or "review the factual record *de novo*." *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *accord Baldwin*, 349 F.3d at 555. This is true even in cases where the court "might have weighed the evidence differently." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); *accord Krogmeier,* 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse the Commissioner's decision "merely because substantial evidence would have supported an opposite decision." *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d 1193, 1198 (8th Cir. 1997); *see Pearsall,* 274 F.3d at 1217; *Gowell*; 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.,* 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen,* 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.,* 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.,* 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only

discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala,* 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan,* 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler,* 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler:*

> The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1) the claimant's daily activities;
> 2) the duration, frequency and intensity of the pain;
> 3) precipitating and aggravating factors;
> 4) dosage, effectiveness and side effects of medication;
> 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

Saenz advances three challenges to the ALJ's opinion. He argues the ALJ erred in (1) discounting P.A. Faldmo's opinions; (2) discounting his subjective complaints of "severe, disabling pain, and functional limitations"; (3) failing to evaluate obesity as a medically determinable impairment, and to consider the effects of Saenz's obesity in arriving at conclusions regarding his ability to work; and (4) giving controlling weight to the consultative physician's opinion in formulating Saenz's RFC, with the result that the VE's opinion could not constitute substantial evidence. (Doc. No. 8, pp. 5-6)

Saenz's first and fourth arguments may be considered together, as both relate to the weight the ALJ gave to the medical opinions of record. Subsequent to the ALJ's opinion,

the Eighth Circuit decided *Shontos v. Barnhart*, 328 F.3d 418 (8th Cir. 2003). In *Shontos*, the court revisited the question of the weight to be afforded the opinions of medical professionals, other than doctors, who have a treating relationship with a claimant. The case does not represent a departure from prior law; rather, the court simply reiterated that the opinions of treating medical sources, including "other" sources such as physicians' assistants, generally are given more weight than non-treating, non-examining sources. *Id.*, 328 F.3d at 426-27 (citing 20 C.F.R. §§ 404.1513(d)(1), 404.1527(d)). Saenz relies on *Shontos* in arguing the ALJ failed to give proper weight to P.A. Faldmo's opinion.

The Commissioner agrees "the ALJ did not analyze the opinion of the physician assistant in a manner that is consistent with current Eighth Circuit case law" (Doc. No. 9, p. 8), but she argues the error does not require reversal because substantial evidence in the record supports the ALJ's decision.[5] In *Shontos*, the Eighth Circuit held, "A treating source's opinion is to be given controlling weight where it is supported by acceptable clinical and laboratory diagnostic techniques and where it is not inconsistent with other substantial evidence in the record." *Shontos*, 328 F.3d at 426 (citing 20 C.F.R. § 404.1527(d)(2). The Commissioner argues P.A. Faldmo's opinions were not consistent with the record evidence regarding Saenz's limitations, including the opinion of Dr. Herrera. (Doc. No. 9, pp. 9-10) The court notes Dr. Herrera's single examination of Saenz did not make him a "treating physician" for purposes of determining the weight to be given his opinion. A treating source is an acceptable medical source who provides the claimant "with medical treatment or evaluation and who has, or has had, an ongoing treatment relationship with [the claimant]." 20 C.F.R. § 404.1502. Dr. Herrera, who

[5]The Commissioner also notes the ALJ did not have the benefit of the *Shontos* opinion, which was issued approximately four months after the ALJ's opinion. However, as noted above, *Shontos* does not represent anything new. The court simply followed the regulations with regard to the weight to be given the opinions of "other" medical sources.

examined Saenz on one occasion, clearly was not a treating source, whereas P.A. Faldmo was.

When a treating source's opinion is not given controlling weight, then the Commissioner must apply several other factors to determine the weight to give the opinion. These factors include whether the source actually examined the claimant; the length, frequency, nature, and extent of the treatment relationship; supportability of the source's opinion; consistency of the opinion with the record as a whole; whether the source is giving an opinion in his or her area of specialty; and any other factors brought to the Commissioner's attention that tend to support or contradict the opinion. 20 C.F.R. § 404.1527(d)(1)-(6). Regardless of the strength of any of these factors, the Commissioner is required to "give good reasons" for the weight given to a treating source's opinion. *Id.* at (d)(2).

In the present case, the ALJ stated he had "given serious consideration to the opinions expressed by [P.A. Faldmo, who] placed what amounts to significant limitations on [Saenz's] ability to function." (R. 19) The ALJ then stated:

> However, the undersigned has given little weight to the opinions expressed by Mr. Faldmo. First, Mr. Faldmo is not considered an acceptable medical source according to 20 CFR 404.1513. More importantly[,] there are only treatment records from Mr. Faldmo that support his opinion. Statements about what an individual can or cannot do must be based upon an acceptable medical source's findings. (20 CFR 404.1513c) Since Mr. Faldmo is not considered an acceptable medical source, the undersigned has given little weight to his opinions expressed in Exhibit 16F [the Medical Source Statement dated 3-12-02, completed by P.A. Faldmo].

Id. The court finds the ALJ's justification for discounting P.A. Faldmo's opinion is inadequate and fails to comply with the regulatory requirements. P.A. Faldmo was

Saenz's exclusive treating medical source from January 31, 2001, through the date of the hearing. He saw Saenz seventeen times in less than fourteen months, from January 31, 2001, to March 18, 2002. As such, he was able to "bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations." 20 C.F.R. § 404.1527(d)(2).

The court finds P.A. Faldmo's opinion regarding Saenz's ability to function should have been given great weight in the ALJ's determination of Saenz's residual functional capacity. "The RFC 'is a function-by-function assessment based upon all of the relevant evidence of an individual's ability to do work-related activities.' S.S.R. 96-8p, 1996 WL 374184, at *3 (Soc. Sec. Admin. July 2, 1996)." *Depover v. Barnhart*, 349 F.3d 563, 565 (8th Cir. 2003). In making his RFC determination, the ALJ was required to consider statements about what Saenz is able to do from his treating medical sources, from other medical sources even if they were not based on formal medical examinations, and from Saenz himself. *See* 20 C.F.R. § 404.1545(a)(3). Because the ALJ failed to give proper weight to P.A. Faldmo's opinion, the court finds the ALJ's determination of Saenz's RFC was erroneous. Therefore, the VE's opinion based on the RFC determined by the ALJ cannot constitute substantial evidence upon which to base a denial of benefits. *See Shontos*, 328 F.3d at 427 (citing *Nevland v. Apfel*, 204 F.3d 853, 858 (8th Cir. 2000)).

On the other hand, the hypothetical questions posed to the VE by Saenz's representative incorporated the limitations P.A. Faldmo found Saenz to have. P.A. Faldmo found Saenz could sit for a total of four hours in an eight-hour workday, but he could only sit for fifteen minutes continuously before needing to stand or walk about for a few minutes. He could stand or walk about for a total of two hours in a day, but only for fifteen minutes continuously before needing to sit for a few minutes. In addition to regular morning and

afternoon breaks and a lunch period, all scheduled at two-hour intervals, Saenz would need two hours of additional rest periods in order to relieve his pain, and he would need to lie down or recline during those additional rest periods. He found Saenz could lift up to ten pounds occasionally, and he should never lift more than ten pounds. He could balance occasionally, and he should stoop or bend forward rarely or not at all. And he could occasionally perform reaching, handling, and fingering tasks. (R. 348-52)

Saenz's representative asked the VE whether "a person of the same age, education, and past relevant work experience" as Saenz, who could only stand for a total of two hours in an ordinary eight-hour workday, would be able to perform any of Saenz's past relevant work. The VE responded he could not. (R. 59) The VE also considered a person of Saenz's age, education, and work experience, who could perform no frequent lifting at all, occasional lifting up to ten pounds, sit a total of four hours in the workday, and stand a total of two hours in the workday, with the remainder of the day spent resting. The VE testified such a person could not return to any of Saenz's past relevant work. (R. 60)

The court therefore finds the ALJ erred in finding Saenz retains the RFC to return to his past work, and in failing to proceed to step five of the sequential evaluation process. Consequently, the court finds this case should be remanded for further consideration.

Addressing Saenz's remaining arguments briefly, it appears the ALJ made a credibility finding that was designed to support his RFC determination, rather than thoroughly assessing the credibility of Saenz's subjective complaints. Of the factors enumerated in *Polaski* and the regulations, the only factor the ALJ considered in any detail was what measures Saenz has used, or failed to use, to relieve his pain and other symptoms. The ALJ correctly noted Saenz has failed to exercise and lose weight as recommended by his doctors. However, the ALJ did not give sufficient consideration to other factors such as Saenz's daily activities, and the dosage and side effects of his

medications. The ALJ recited facts relating to these factors, but performed no analysis and made no findings regarding them. Upon remand, the ALJ should be directed to perform a thorough *Polaski* analysis before rejecting Saenz's testimony regarding his limitations.

Lastly, the court finds no support anywhere in the record for Saenz's claim that the ALJ erred in failing to consider his obesity as a severe impairment, and to determine its effect on his limitations. Saenz never alleged that his obesity was disabling, and he presented no evidence to support such a claim. The mere fact that Dr. Martin calculated Saenz's body mass index (BMI) does not equal an opinion by Dr. Martin that Saenz's obesity constituted a severe impairment. The record not only fails to contain substantial evidence to support such a claim, it contains virtually *no* evidence to support this argument.

V. ARGUMENT

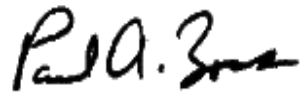
For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections[6] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service

[6]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

of a copy of this Report and Recommendation, that the Commissioner's decision be reversed, and this case be remanded for further proceedings consistent with this opinion.[7]

IT IS SO ORDERED.

DATED this 30th day of March, 2004.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[7]NOTE: If the district court overrules this recommendation and final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.